IN RE: PETITION FOR SPECIAL HEARING N/S of Bomont Road at its Intersection with Mays Chapel Road 8th Election District 2nd Councilmanic District (**11500 Mays Chapel Road**) Deborah Terry, et al., Petitioners (referred to herein as "Community") Baltimore Country Club of Baltimore City, Legal Owners and Petitioner (referred to herein as "BCC")	*	BEFORE THE DEPUTY ZONING COMMISSIONER OF BALTIMORE COUNTY CASE NO. 04-508-SPH (filed by D. Terry et al) & CASE NO. 04-600-SPH (filed by BCC)

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 04-508-SPH comes before this Deputy Zoning Commissioner as a Petition for Special Hearing filed by adjacent property owners, Deborah and Fred Terry, Donna Dow, M.D., Joseph R. B. Tubman and Courtney Spies, Jr. The Petitioners have filed a Petition for Special Hearing regarding property owned by the Baltimore Country Club of Baltimore City located at 11500 Mays Chapel Road in the Timonium area of Baltimore County. The special hearing request is filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), for eleven questions presented having to do with BCC's proposal to build twelve tennis courts and a tennis building.

Similarly, Case No. 04-600 is a Petition for Special Hearing filed by the legal owner of the subject property, Baltimore County Country Club of Baltimore City regarding the same issues. The Petitioner is requesting a special hearing for the same property pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), and asks four questions regarding tennis facilities at BCC.

The property was posted with Notice of Hearing on June 16, 2004, for 15 days prior to the hearing, in order to notify all interested citizens of the requested zoning relief. In addition, a Notice

of Zoning hearing was published in "The Jeffersonian" newspaper on June 29, 2004 to notify any interested persons of the scheduled hearing date.

Applicable Law

Section 500.7 of the B.C.Z.R. *Special Hearings*

The Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall in his discretion be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals. The power given hereunder shall include the right of any interested persons to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any non conforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they may be affected by these regulations.

Zoning Advisory Committee Comments

The Zoning Advisory Committee (ZAC) comments are made part of the record of this case and contain the following highlights: A ZAC comment was received from the Office of Planning dated July 12, 2004, a copy of which is attached hereto and made a part hereof. The Office of Planning has included recommendations in their ZAC comments, some of which will be restrictions to this Order.

Interested Persons

Appearing at the hearing on behalf of the community were Donna Dow, Courtney Spies, Jr., J. R. B. Tubman and Kathleen Tubman, Fred and Debbie Terry, and Marvin Tenberg, Vice-President of the Falls Road Community Association, Petitioners. J. Carroll Holzer, Esquire, represented the community. Appearing on behalf of the Baltimore Country Club were Michael Fisher, W. Daniel White and Michael Stott. Scott Barhight, Esquire, represented the Baltimore Country Club. People's Counsel, Peter Max Zimmerman, entered the appearance of his office in this case.

Status of the Case

This property is a 406.4 acre parcel in an RC.5 zone, on which the Baltimore Country Club of Baltimore City (BCC) operates a recreational social club with two golf courses, a club house and

swimming pools. BCC proposes to build twelve tennis courts and a tennis building partially on the original 400 acre parcel and partially on a more recently acquired 2.6 acre parcel known as Parcel A. This property is the subject of both cases and for the convenience of the parties has been combined herein. The "Community", which is the agreed designation of adjacent property owners, objects to the proposal requesting that the terms of an Agreement between the same parties in 1993 be maintained, which specified that nine tennis courts could be built. "BCC" will be the agreed designation for the Baltimore Country Club of Baltimore City.

The Community presented the zoning history of the two properties which is not in dispute. The Zoning Commissioner found in Case No. 93-37 SPH, that BCC operated a nonconforming country club on the original parcel of approximately 400 acres. Part of the approved plan included six tennis courts on the original parcel. The Community appealed this case to the Board of Appeals. BCC subsequently requested a special exception for three more tennis courts and parking on Parcel A in Case No. 93-388-X. While the appeal of Case No. 93-37 SPH was still pending before the Board of Appeals and Case No. 93-388-X was being heard, the parties entered into a written Agreement that BCC could erect nine tennis court on portions of the original property and Parcel A. The was incorporated into the Order in Case No. 93-388-X and the Community dismissed their appeal from Case No. 93-97 SPH. In 1997, the Community filed a request for Special Hearing to essentially review the terms of the prior order and how BCC carried out the terms therein. The Deputy Zoning Commissioner ruled on each of seven questions.

What is in dispute in this case centers on what the terms of the 1993 Agreement actually mean and what affect this has on BCC's proposal to build twelve tennis courts and a tennis building again on portions of the original property and Parcel A. BCC raised preliminary motions to dismiss and to define the scope of the hearing to follow. This Deputy Commissioner ruled on each preliminary question as shown in the Order on Preliminary Motions incorporated into the file.

Testimony and Evidence

Doctor Donna Dow, who is a nearby property owner, testified that she became concerned about BCC's purchase of Parcel A in 1991. Parcel A is one of the properties along the southern border of BCC where most of the Community members in this case reside. These homes are served by Bomont Road, which gives each property access to public Mays Chapel Road. The thirteen property owners along its route privately maintain Bomont Road. Dr. Dow explained that BCC's property is substantially elevated above the residences along Bomont Road, which means that rainwater runoff from BCC's property ultimately flows onto these residences below and eventually collects in swales and a stream that bisect this residential area.

Dr. Dow explained that the Community was concerned about storm water management, traffic generated on the area public roads, and noise and lighting coming from the tennis facilities. She particularly noted that during construction of a parking lot for BCC in 1996, a construction accident allowed storm water and sediment to inundate Bomont Road clogging drain pipes, culverts and the road itself. She noted that several of the proposed courts are within 100 ft. of Community residences. She also expressed concern that terms of the 1993 Agreement were not met because the Community did not receive storm water design drawings and calculations. She said that these were required to be provided under the terms of the 1993 Agreement in regard to the present proposal. She also noted that the plans the Community received from BCC, or otherwise obtained, showed different configurations for tennis courts, buildings, parking and access so the Community was never exactly sure what was being proposed. She also said that she wanted a sound barrier included in this plan as authorized in the 1993 Agreement.

In regard to the nonconforming uses being made of the property, she indicated that she thought the changes made by BCC since 1963 exceeded the 25% extension rule of Section 104 of the B.C.Z.R. In support of this contention, she submitted recent photographs and aerial

photographs taken of BCC property in 1964, as shown in Community Exhibit Nos. 15A through 15D.

On cross-examination, she admitted that the Community received several sets of plans from BCC prior to the Community filing its case, but that the important storm water management plans and calculations were not provided. She also admitted that the Community did not respond to an invitation by BCC to meet and discuss the plans presented by BCC in the fall of 2003, because she felt this was a waste of time and money given the history of BCC.

Dennis White, Chairperson of the Tennis Facilities Committee of BCC, indicated that BCC wants to relocate its tennis facilities currently located in Baltimore City to this Baltimore County location. He testified that BCC prepared a master plan in 1993 to that effect, which plan included having enough courts to hold tennis tournaments and inter-league play, providing a tennis building to house BCC's tennis pro, locker rooms and supporting equipment, and controlling access by the public to the tennis facilities. He indicated that the 1993 site plan, approved by the Zoning Commissioner in Case No. 93-388-X, contained all the elements of the present proposal except for the addition of three courts. He noted that the 1993 site plan had a tennis building north of the six courts in the nonconforming area. To illustrate this point, he marked this location on Community Exhibit Nos. 2 and 4 in blue highlighter. He testified that this building had a footprint originally specified on the 1993 plan as approximately 2,900 sq. ft. and the new tennis building is 3,300 sq. ft. as shown on Community Exhibit No. 8. In addition, the building is now moved from above the courts to be located on the west side of the courts. This was done to maintain the view from the swimming pools and to provide better security for the tennis facilities. In this regard, the entrance previously shown on the 1993 plan from Mays Chapel Road was eliminated. Access to the courts will now come via the tennis building, which will be controlled by the tennis staff. Along with these changes the parking for the tennis facilities was relocated.

Mr. White indicated that this plan evolved over time at BCC but was designed so as not to violate the 1993 Agreement with the Community. In that regard, he testified that BCC sent design drawings to the Community in the fall of 2003 and that the only response received from the Community, of which he was aware, was to ask for and have BCC provide more detailed drawings with an easier to read scale.

He admitted on cross-examination that he was not a member of the tennis relocation committee when the master plan was drafted. He also said that the need for 12 courts surfaced two years ago when BCC determined that they would not operate separate tennis facilities in the City and County. He indicated that there were 25 courts in BCC's City facility. He also noted that BCC recently changed engineers, which meant that the engineers might not have been aware that storm water management designs would be important to the Community. He was doubtful that the date of October 31, 2002, shown in the latest design on Community Exhibit No. 8, was accurate. He noted that the tennis building in the City is approximately 2,700 sq. ft., which housed the tennis pro, the pro shop and the locker rooms, all of which functions would be transferred to the County location as proposed.

Michael Fisher, licensed landscape architect, testified that the date on Community Exhibit No. 8 was in error and should have been the year 2003 instead of 2002. He noted that the revised plan shown as Community Exhibit No. 1 (as compared to Community Exhibit No. 8) refines the tennis courts in the nonconforming area, eliminates the entrance from Mays Chapel Road, and replaces the parking lot between sets of courts on Parcel A with vegetative material. He noted that the storm water management facilities for the final plan have been reviewed and approved by DEPRM. See BCC Exhibit No. 4. He testified that courts #8 and #10 are respectively 20 ft. and 5 ft. in elevation above the nearest residence. The new tennis building is likewise 20 ft. above this home and approximately 240 ft. in lineal distance from the residence. He indicated that a vegetative screen would be maintained between the courts and the residence.

On cross-examination he indicated that the tennis court would not be lighted. He testified that specific parking is not provided in a country club for each function, such as golf, pool, tennis, etc., but rather an overall parking plan accommodates the many uses of the facility and that parking was adequate for the tennis facilities proposed. He saw no environmental advantage to moving the three courts located in Parcel A toward the other tennis courts and further away from the residences.

Dr. Dow was called as a rebuttal witness. She disputed Mr. White's assertion that the blue highlighted areas on Community Exhibit Nos. 2 and 4 depicted a tennis building. She indicated that she attended the 1993 hearings and that the spokesperson for BCC at the time, Mr. Spellman, testified that that those markings were where spectators could watch the tennis matches. No mention was ever made of a tennis building, nor was this building mentioned in the Agreement between BCC and the Community that was executed in 1993. She opposed the continuing expansion of BCC insisting that the parties signed an Agreement in 1993 for nine tennis courts and this is all BCC is entitled to have. She noted that Section 406 A of the B.C.Z.R. requires tennis facilities to be more than 100 ft. from an RC zoned property and not from a residence. She contends the subject plan violates this provision. Finally, she noted that the 1993 Agreement provides that the Community can require BCC to erect sound barriers to reduce the noise from the tennis facility and she demanded such a noise barrier be installed in this case.

She applauded the change that eliminated vehicular access to the courts from Mays Chapel Road but wanted to make sure that the courts would not be lighted because she can now see the lights from the parking lots, which are much further away. She emphasized that the Community expects the 1993 Agreement to be enforced by the County in this matter and that no more than nine courts should be allowed. She noted that BCC's attorney wrote the Agreement and that there was no mention of the tennis building in the Agreement.

Finally, she noted the extensive correspondence from the Community attorneys to BCC's attorneys in regard to what drawings and designs were provided to the Community pursuant to the

terms of the Agreement. She also indicated that the Community was not provided with storm water management drawings or designs, which she contends violates the Agreement. On cross-examination she admitted that the Community did not avail themselves of the invitation by BCC to meet and discuss their plans.

Findings of Fact and Conclusions of Law

The testimony and evidence presented indicates the very stormy and suspicious relationship between BCC and the Community that has developed over the past dozen years and continues today. I expressed my concern at the hearing that the matters at issue today were addressed to some degree in zoning and civil cases between the parties in 1993, 1996, 1997 and the subject cases.

Questions Presented

BCC

1. **What are the geographic limits of the nonconforming use found to exist in Case No. 93-37-SPH?**

I understand that as a result of the Agreement between the Community and BCC in Case No. 93-37 SPH, the Community dismissed its appeal to the Board of Appeals. Consequently, the Plat to Accompany that case (Community Exhibit No. 2) would define the geographic limits of the nonconforming area, less Parcels A and B which were denied by the Zoning Commissioner as extensions of the nonconforming use as a country club. Subsequently, BCC filed a request for Special Exception for Parcels A and B, which Plan to Accompany (Community Exhibit No. 4) showed those parcels and the nonconforming area previously granted. I have not reviewed the detailed differences, if any, between these documents but based upon the presentations made, the best geographic description of the nonconforming area is given on Community Exhibit No. 4 and labeled "nonconforming area".

BCC

2. **Within the context of the provisions relating to the Outdoor Recreational Area in Zoning Case 93-37-SPH, does the Baltimore County Country Club have the right, without further proceedings before the Zoning Commissioner, to alter the proposed tennis area, including providing additional tennis courts, within the geographic limits of the nonconforming use as shown on the site plan to accompany this Special Hearing?**

Community

1. **Does the Deputy Zoning Commissioner's decision in Case No. 97-384-SPH, attached hereto (as Exhibit A) require the Baltimore Country Club (thereinafter "B.C.C."), to seek a Special Hearing to determine whether its proposal to construct 12 tennis courts in lieu of 9 courts is permissible? (See present proposal as Exhibit B). The Petitioners' position is that such a hearing is required**.

Now that I have heard the testimony and seen the evidence in the case, I will attempt to expand on the preliminary decision made in the Order on Preliminary Motions. I ruled in the above Order that a hearing was necessary. Said another way, BCC cannot proceed with its plans without a hearing on the overall plan. In that Preliminary Order, I mentioned that I agreed that the proposed plan for 12 tennis courts and a tennis building requires a special hearing even if all meaningful changes are contained within the nonconforming area.

I gave as reasons, that BCC chose to design a tennis court layout that located tennis courts on both special exception and nonconforming areas. This was done presumably for sound engineering and cost reasons. The fact that the three courts were not located solely in the special exception area does not, in my view, support an argument that I should somehow look at the two areas separately. First, from a common sense standpoint this is one plan. Rain falling on the proposed courts and building will not distinguish between the two legal entities. The storm water facilities that process the rain do not distinguish between the two legal entities. Similarly, the parking lot will serve both facilities as well as the new tennis building. I cannot make a rational decision if I separate the two. These are again reasonably one plan.

I would add to this reasoning that BCC has chosen to tie use of both the Special Exception parcel and the nonconforming parcel together having to do with tennis at BCC by entering into the

1993 Agreement. This Agreement was incorporated into the Order of Case No. 93-388-X. Therefore, we have an Order of the Commission that ties the two together. Having thus joined together, we cannot simply divorce one from the other in this case. This ruling, however, applies only to the limited extent of tennis facilities at BCC.

BCC

3. **Whether the Zoning Commissioner's "Findings of Fact and Conclusions of Law" and Order in Zoning Case 97-384-SPH imposes any restrictions on the rights of Baltimore Country Club with respect to the nonconforming use found to exist in Zoning Case No. 93-37-SPH. If so, what are the restrictions?**

I find that no such restrictions save having to have any changes to the Plan to Accompany (Community Exhibit No. 4) reviewed by the Commission.

Community

2. **Is the BCC proposed plan for 12 tennis courts, a tennis building and the elimination of a sound barrier wall in violation of the Agreement of June 14, 1993, between the Petitioners and the BCC (Exhibit C)? Did the BCC fail to provide SWM plans prior to County submission in violation of the Agreement and the Zoning Commissioner's decision incorporating same? The Petitioners position is yes. The Agreement was incorporated in the Deputy Zoning Commissioner's Decision in Case No. 93-388-X and is subject to a zoning determination.**

3. **Does the BCC breach of the 1993 Agreement void the prior SE so that BCC must reapply for a SE?**

6. **Does the breach of the parties' 1993 Agreement (Exhibit C), reopen the Petitioners' issues raised in Case No. 93-388-X?**

The 1993 Agreement between the Parties was incorporated into the Commission's Order in Case 93-388 X. This Commission has no jurisdiction to hear or decide breach of contract cases. That is for the judicial system to consider. Once the Agreement was incorporated into the Order, any breach of the Order is simply a zoning violation to be processed, and adjudicated within the zoning enforcement arm of the Department of Permits and Development Management (PDM). This Commission no longer has jurisdiction to hear or adjudicate zoning violations. This is the exclusive jurisdiction of PDM.

Consequently, whether BCC violated the Order in failing to supply the proper documents is wholly outside this Commission's present charter. In regard to penalties for such alleged violations, to my knowledge PDM is limited in what penalties it can impose on violators. In any case, I deny the Communities request that the Special Exception granted BCC in Case No. 93-388-X be voided.

That said, I would like to explain to the members of the Community the good and bad news they engage when they enter into a private Agreement which is incorporated into a Commission Order. The good news is that if the developer, petitioner, or in this case BCC, violates the Order, the Community simply calls the County who, after proper investigation, will enforce the Order and impose fines and penalties as the administrative hearing within PDM determines. These fines can be levied on a daily basis and can become very large very quickly and often are enough to convince the wrongdoer to change its ways.

The bad news is that any Order of this Commission is subject to revision upon petition by an interested party. Said another way, a private Agreement cannot bind the government to a specific course, if the County later determines that the change is appropriate. Requests for such changes are routinely considered and approved by this Commission. They often arise because a site plan was approved by the County and the circumstances have changed. Therefore, after public hearing, revised site plans can be and regularly are approved to allow new uses, or additions, or whatever. In this case, the Community asks that the 1993 Agreement be enforced. As a private Agreement, this can only be done by the Courts. As part of a Commission Order it is subject to revision as are all such Orders.

Community

4. **Does the proposal of BCC for 12 tennis courts (Exhibit B) require review by PDM as "development" per Baltimore County Code, §26-168(p)(I) as "the improvement of property for any purpose involving building"? The Petitioners allege that the construction of 12 tennis courts is building and requires development review, as per 1992 development procedure for the initial plan for tennis courts.**

5. What is the definition of "development" pursuant to the B.C.Z.R. and does construction of 12 tennis courts meet that definition?

The definition of "building" given in §26-168 (g) and new code §32-4-101(g) is as follows:

> (g) "Building" means a structure enclosed within exterior walls or fire walls for the shelter, support or enclosure of persons, animals or property of any kind"

Clearly, the tennis courts are not "structures…. for shelter, support or enclosures,…etc." Therefore, within the context of this case, there is no "Development" here requiring processing of development plans. I will leave the intriguing jurisdictional question of whether or not this Commission, rather than PDM, can decide such issues for another day.

Community

7. Has the BCC exceeded the expansion permitted a "nonconforming" use by the B.C.Z.R., §104 and §104.3. Petitioners submit that it has expanded in violation of §104.3. (Exhibit D)

8. If the BCC has exceeded the expansion permitted by §104.3, has it lost its nonconforming status? (§104.1 and §101) (Exhibit D). Petitioners submit that it has lost its nonconforming status.

9. Even if the BCC now has a legal nonconforming use, will the construction of three (3) additional tennis courts and thirty (30) parking spaces be an illegal expansion of the nonconforming use?

BCC argues that this issue is moot because Zoning Commissioner Schmidt, in Case No. 93-37-SPH, has already decided this issue. In that opinion, Mr. Schmidt stated that it was land and not structures which form the basis of the country club use, and that buildings are incidental to the nonconforming country club. The approved plan also specifically allows for adjustments in area and location of other improvements consistent with the nature and scope of the country club use. Consequently, BCC argues that the new tennis courts are allowed under the prior case and I am bound by the doctrine of *res judicata* to follow that decision.

I disagree in part and agree in part with BCC's position. I agree that I am bound to recognize the Order in this case, that BCC has a nonconforming use as a country club with all modifications shown on the site plan (Community Exhibit No. 2). I do not believe that I am bound by the Zoning

Commissioner's reasoning in how he arrived at the end result. His reasoning merely gives his method for arriving at the decision. I am bound by the decision only. As such, we cannot revisit issues such as enlargement of the clubhouse or that six tennis courts are allowed as accessory uses to the overall country club nonconforming use. However, BCC proposes three additional courts not contained in the original plan which are subject to review in my opinion.

In regard to language on the approved site plan allowing modification and location of buildings and structures, I read these provisions to simply reflect the law of nonconforming uses, that intensifications of nonconforming uses are allowed but that extensions are subject to the 25% rule. As such, I will now make the determination as to whether or not the three additional courts are an intensification or extension.

To determine if the proposed use is an allowed intensification of the use or an extension of the use subject to the 25% rule, one looks to the four part test of *McKemy v Baltimore County*, 39 Md App. 257 (1978). McKemy court states:

(1) to what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;
(2) is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind;
(3) does the current use have a substantially different effect upon the neighborhood;
(4) is the current use a "drastic enlargement or extension" of the original nonconforming use.

If the proposed changes are found to be an extension and not an intensification, one then looks to Section 104.3 which states,

> "No nonconforming building or structure and no nonconforming use of a building, structure or parcel of land shall hereafter be extended more than 25% of the ground floor area of the building so used."

Applying these general principles to this case, I find that six tennis courts were shown as accessory uses in the nonconforming area of Community Exhibit No. 2. BCC wishes to increase the number of courts to nine. (I am ignoring the three courts granted on Parcel A by special exception for this argument.) Applying the McKemy test, I find that the additional three courts are

not intensifications but rather extensions of the nonconforming uses and subject to the 25% rule. I find this because, while these three additional courts meet the first and second McKemy test, in my view they will have a substantially different effect on the neighborhood and they are a drastic enlargement of the original nonconforming six courts. Courts # 8 and # 9 are respectively 20 ft. and 5 ft. in elevation above and approximately 120 ft. in lineal distance from the nearest residence in the Community. The noise and commotion from matches on these courts will likely have a substantial effect on this property. The storm water from these courts will be felt immediately by this property. Consequently, I find that the three additional courts are subject to the 25% rule.

The next inquiry is whether the proposed "tennis building" is simply an intensification or an extension of the non conforming "structure" shown in blue highlighter on Community Exhibit Nos. 2 and 4. I will call the thing indicated in blue as the "blue structure" hereafter. Mr. White testified that he understood that the blue structure was a one-story tennis building containing 2,900 sq. ft. in area. He testified that BCC merely proposed to move the structure to the west, as now shown on the latest plan, (Community Exhibit No. 8) and to modestly expand the size to 3,300 sq. ft. keeping the one-story configuration. The tennis building would then hold the office and facilities of the tennis pro, pro shop and locker rooms for member using the tennis courts.

Dr. Dow was incredulous. She testified that she attended the 1993 hearings, that the spokesman for BCC, a Mr. Spellman, never described the blue structure in testimony as a tennis building, but rather that it was simply a place from which spectators could watch the tennis matches. There were also no tennis pro, no pro shop, and no locker room presented in the 1993 case or referred to in any way as a tennis building in the 1993 Agreement between BCC and the Community. Mr. White admitted that he only recently was given the committee assignment to move the tennis facilities wholly from the City campus to the subject site and so had no personal knowledge of the original Agreement or case testimony.

I have no reason to doubt Dr. Dow's testimony. I know that, had there been a "tennis building" even as a gleam in BCC's eye in 1993, that fact would be reflected in the Agreement. It was not. However, I also have no doubt that the blue structure was in fact some sort of building with at least a roof and supporting framework. The symbol on Community Exhibit Nos. 2 and 4 under the blue highlighter indicate this fact. Consequently, applying the *McKemy* test, I find that the new tennis building shown on the plan is an extension of and not an intensification of the blue structure shown in Community Exhibit Nos. 2 and 4 and therefore subject to the 25% rule.

Having determined that both the tennis building and additional tennis courts are extensions, the next problem becomes to determine the basis of what one should take 25% ?

The answer to this question depends in this case on what date applies. The Zoning Commissioner determined in Case No. 93-37 SPH that the law regarding country clubs changed in 1963. He found that BCC had an existing nonconforming use as of this date, but the case in which he made this determination was not heard until 1993. Between 1963 and 1993 obvious changes took place in the physical layout and accessory uses of the property, all of which the Zoning Commissioner approved as intensifications and not extensions of the underlying nonconforming use as a country club.

In the subject case, the Community presented evidence of the extensive additions and changes that BCC has made since 1964. See aerial photographs, Community Exhibit Nos. 15A through 15D. The Community suggests that 1963 is the proper date. However, while 1963 is clearly the date of the start of the nonconforming use, in this case I find that the 1993 plat to accompany the special hearing case (Case No. 93-37-SPH), Community Exhibit No. 2 defines the nonconforming area and uses on the premises as found by the Zoning Commissioner. This is the plat against which one must measure any change.

A second inquiry is, what does the statute mean in this case? Section 104.3 specifies "No nonconforming building or structure and no nonconforming use of a building, structure or parcel of

land shall hereafter be extended more than 25% of the ground floor area of the building so used." This issue recently arose in another case in which the owner of a one-story nonconforming apartment building added a second floor to the building and then yet another apartment on the side of the first after the date the original apartment became nonconforming. Counsel for the Petitioner argued that the statute specifies that one should consider only the footprint of the nonconforming building. However, this interpretation leads to an untenable conclusion, in my view, where one could add ten stories of new uses above the original footprint of the first floor and never have an extension even though the uses would multiply tenfold. It seems to me that the Council did not intend "first floor area" to mean a precise mathematical definition (area = length x width), but rather they intended this to mean first floor volume. Consequently, adding a second floor to the nonconforming use would violate the 25% rule if the volume added exceeded 25% of the first floor volume.

The statute also specifies that "no nonconforming building or structure and no nonconforming use of a building, structure or parcel of land shall hereafter be extended more than 25%". However, it then goes on to specify the basis for buildings only, that is, "of the ground floor area of the building so used". What then is the basis of an extension of a structure or of land? What description of land or a structure would one multiply 0.25 by to determine if the 25% rule were violated?

One answer that would <u>not</u> make sense, in my view, is to simply say that since no specific basis were given, extensions of land or structures are not limited. In its most extreme interpretation, if nonconforming structures and land were not limited, one could find situations where property that is subject to the regulations is constrained by the law, but nonconforming structures and land are not constrained. This cannot be since nonconforming uses are not favored in law.

Nor can one conclude that accessory uses of a country club are not limited simply because they are accessory. Again, if this were true, a country club could erect a massive tennis facility, which dominates the region. This would violate the very definition of an accessory use or structure that is specified in the B.C.Z.R. as follows:

"A use or structure which: (a) is customarily incident and subordinate to and serves a principal use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structure served; and (d) contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served; except that, where specifically provided in the applicable regulations, accessory off-street parking need not be located on the same lot. An accessory building, as defined above, shall be considered an accessory structure."

I think that the proper interpretation of the statute that will give meaning to all of the words therein is to simply say that structures and land of nonconforming uses may not be extended more that 25 % of the area of land or 25% of the volume of structures.

Applying these general principles to this case, I find that six tennis courts were shown as accessory uses in the nonconforming area of Community Exhibit No. 4. BCC wishes to increase the number of courts to nine. This is a 50% increase that violates the 25% rule. Only one additional tennis court is allowed.

Regarding the tennis building, I have no doubt that the area for this structure is approximately 2,900 sq. ft. and the new tennis building shown on the latest plan is approximately 3,300 sq. ft. as Mr. White indicated. There would then be a 400 sq. ft. increase, which is only 14% of the approved structure. Consequently, I conclude that this structure does not violate the 25% rule as an extension of the 1993 blue structure. Nor does relocating it to a more useful location violate the rule. In fact, its new location allows BCC to control access to the court in a meaningful way, eliminates the access road and parking between the courts and presents a far superior design as to what was shown in the 1993 site plan.

Community

10. Pursuant to the authority in §500.7, the Zoning Commissioner must interpret issues posed related to the Zoning Regulations, and specifically §1A00, General Provisions for all R.C. classifications, the intent of which, pursuant to §1A00, requires the Zoning Commissioner to "protect both natural and man-made resources from compromising effects of specific forms and densities of development;" and specifically, §1A04.B.3, the R.C. 5 Zone to "assure that encroachments onto production or critical natural resource areas will be minimized," the Petitioners pose the following questions;

A. Does the proposed development conflict with §1A00.2.C and §1A04.B.3 by failing to protect natural resources because the project is designed in a manner necessitating a variance to the forest buffer regulations designed to protect streams and also it fails to incorporate the channel erosion prevention and water quality protection provisions of the 2000 Maryland Storm Water Design Manual? (See attached Affidavit of Bowers as Exhibit No. E)

B. Has the BCC failed to demonstrate compliance with §1A04.B(3) not minimizing encroachment into the forest buffer?

C. The Zone of the subject site requires protection of the natural resources. §14-432 of Article IX prohibits intrusion into the forest buffer. The BCC proposes such intrusion, but no evidence of feasible alternatives is presented. (§14-334b). This Petition requests determination by the Zoning Commissioner that the proposed project violates the aforesaid Zoning Regulations.

D. Whether §14-403(b) o the Development Regulations permits BCC to avoid the need to comply with written forest conservation requirements by exempting tree clearance below 40,000 sq. ft.? Petitioners do not believe this Regulation allows BCC to be exempt.

E. Whether the BCC must comply with the MDE 2000 Maryland Storm Water Design Manual? The existing storm water facilities were designed and approved in 1996; the new Design Manual was adopted in 2000 and the BCC project is not consistent with any of the exempted activities in §14-155 of County Storm Water Management Regulations; the project fails to drain all impervious surfaces to a storm water management resource; nor does it comply with the requirements applicable to redevelopment projects per §14-155©. This Petition requires a determination by the Zoning Commissioner that the proposed project violates the aforesaid Zoning Regulations. (See Exhibit No. E).

The Community determined not to present evidence in regard to these questions at this hearing and, therefore, I find that there is no evidence to indicate that the proposal violates any environmental regulations.

Community

11. Has the Special Exception for the Boyce parcel expired since its granting by the Zoning Commissioner. Has BCC lost its SE because it failed to timely act upon the SE and that circumstances have changed in the eleven (11) years since it was granted?

As answered in the Motion to Dismiss, I find that the Special Exception granted previously on Parcel A has not expired.

BCC

3. Whether the Zoning Commissioner's "Findings of Fact and Conclusions of Law" and Order in Zoning Case 97-384-SPH imposes any restrictions on the rights of Baltimore Country Club with respect to the nonconforming use found to exist in Zoning Case No. 93-37-SPH. If so, what are the restrictions?

None other than changes to the approved plan require a hearing.

4. If the Zoning Commissioner determines that Zoning Case No. 97-384-SPH requires a public hearing to approve the configuration of the tennis area as shown on the site plan to accompany this Special Hearing, then the Baltimore Country Club seeks approval of the configuration of the tennis area as shown on the site plan to accompany this Special Hearing.

I approve the BCC plan for the tennis area shown as Community Exhibit No. 8 with Tennis Courts 8 and 9 eliminated.

Community

The Community raised the issue of whether or not the proposed plan violates the setback requirements of Section 406 A regarding tennis facilities, specifically Section 406A3 which requires tennis facilities to be set back 100 feet from any RC zoned property.

The additional three courts are within the nonconforming area of the plan and in particular are accessory uses to the nonconforming country club which Mr. Schmidt approved in case 93-37 SPH. In that sense, they are extensions of the allowed nonconforming use. They are not new tennis facilities, which require that they comply with Section 406.A3 any more than any nonconforming use is required to comply with regulations imposed after nonconforming status is established.

Summary

I find that the proposal to increase the number of tennis courts from six to nine in the nonconforming area of the property is not an intensification but rather an extension of the nonconforming accessory use recognized in Case No. 93-37-SPH. I further find that the proposal violates the 25% rule given in Section 104.3 of the B.C.Z.R. and that only one additional tennis court may be built.

I find further that the blue structure, shown on Community Exhibit Nos. 2 and 4, was a structure of 2,900 sq. ft. which was recognized by the decision of the Zoning Commissioner in Case No. 93-37-SPH, that the proposed tennis building shown on Community Exhibit No. 8 is an extension and not an intensification of the blue structure, and, therefore, subject to the 25% rule. I further find that the proposed tennis building, however, does not violate the 25% rule as presented.

I approve BCC's plan for the tennis area, as shown on Community Exhibit No. 8, with Tennis Courts 8 and 9 eliminated.

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and for the reasons given above, the special hearing request shall be granted.

THEREFORE, IT IS ORDERED, by the Deputy Zoning Commissioner for Baltimore County, this 22nd day of October, 2004, that the Special Hearings requested in Case No. 04-508-SPH, filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), be and is hereby GRANTED to the extent that the proposed additional three tennis courts are extensions of the previously approved nonconforming accessory use and violate the 25% rule against such extensions; and

IT IS FURTHER ORDERED, that the Special Hearing requested in Case No. 04-600-SPH, filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), be and is hereby GRANTED to the extent that one additional tennis court and the new tennis building may

be constructed on the site; subject, however, to the following restrictions which are conditions precedent to the relief granted herein:

1. The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30 day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the Petitioners would be required to return, and be responsible for returning, said property to its original condition;

2. BCC shall erect a sound barrier between the tennis courts and adjacent residents and shall submit a landscape plan which screens the tennis courts to the Office of Planning for review and approval prior to the issuance of any building permits; and

3. When applying for a building permit, the site plan filed must reference this case and set forth and address the restrictions of this Order.

IT IS FURTHER ORDERED, that BCC's plan for a tennis facility as shown on Community Exhibit No. 8, eliminating Tennis Courts 8 and 9, be and it is hereby GRANTED; and

IT IS FURTHER ORDERED, that the terms of the Deputy Zoning Commissioner's Order in Case No. 93-388-X, not modified herein, are fully in force and effect.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

____SIGNED_____
JOHN V. MURPHY
DEPUTY ZONING COMMISSIONER
FOR BALTIMORE COUNTY

JVM:raj